

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PAUL B. SWIM,)	
)	No. CV-06-263-MWL
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
MICHAEL J. ASTRUE ¹ ,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment, noted for hearing without oral argument on April 9, 2007. (Ct. Rec. 12, 17). Plaintiff Paul Swim ("Plaintiff") filed a reply on March 12, 2007. (Ct. Rec. 19). Attorney Norman R. McNulty, Jr., represents Plaintiff; Special Assistant United States Attorney Jeffrey H. Baird represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6). After reviewing the

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As of February 12, 2007, Michael J. Astrue succeeded Acting Commissioner Linda S. McMahon as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25 (d)(1), Commissioner Michael J. Astrue should be substituted as Defendant, and this lawsuit proceeds without further action by the parties. 42 U.S.C. § 405 (g).

1 administrative record and the briefs filed by the parties, the
2 Court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 17)
3 and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 12).

4 **JURISDICTION**

5 On April 8, 2003, Plaintiff applied for disability insurance
6 benefits ("DIB), alleging disability beginning March 1, 2003, due
7 to vision problems in his left eye, hearing problems and back
8 pain. (Administrative Record ("AR") 71-73, 82). The applications
9 were denied initially and on reconsideration.

10 On August 11, 2005, Plaintiff appeared before ALJ Paul
11 Gaughen, at which time testimony was taken from plaintiff,
12 treating psychologist Donna Rosen, Ph.D., and vocational expert
13 Deborah LaPoint. (AR 428-465). At a supplemental hearing on
14 November 9, 2005, medical expert Ronald Klein, Ph.D., and
15 vocational expert Tom Moreland testified. (AR 381-427). The ALJ
16 issued a decision finding that plaintiff was not disabled on April
17 26, 2006. (AR 17-26). The Appeals Council accepted additional
18 evidence but denied the request for review. (AR 6-12). Therefore,
19 the ALJ's decision became the final decision of the Commissioner,
20 which is appealable to the district court pursuant to 42 U.S.C. §
21 405(g). Plaintiff filed this action for judicial review pursuant
22 to 42 U.S.C. § 405(g). (Ct. Rec. 4).

23 **STATEMENT OF FACTS**

24 The facts have been presented in the administrative hearing
25 transcript, the ALJ's decision, the briefs of both plaintiff and
26 the Commissioner and will only be summarized here. Plaintiff was
27 50 years old on the date of onset. (AR 25). He completed the
28 eleventh grade and did not earn a GED. (AR 88, 452). Plaintiff

1 never learned to read. (AR 452).

2 At the first administrative hearing held on August 11, 2005,
3 plaintiff testified that he had worked as a logging truck driver
4 for ten years, until late February of 2003. (AR 436, 438). He
5 stopped working because he went blind in one eye in the fall of
6 2002 and experienced back problems and pain. (AR 438). After he
7 stopped working plaintiff cut a little firewood to help people
8 out. (AR 440). He testified that when he wore hearing aids his
9 "head would plug up so bad I couldn't breathe" and his "ears would
10 virtually shut down where I couldn't hear." (AR 454). At age
11 nine or ten, plaintiff fell out of a tree. (AR 454). He
12 testified that when he was 18, x-rays were taken of his back and
13 he was told his back was broken in three places. (AR 454).
14 Plaintiff worked for years performing hard physical labor despite
15 daily back pain. (AR 455). He can walk for one block, and
16 sitting and lifting are painful. (AR 455-456). Plaintiff's pain
17 occurs pretty much every day and lasts from the time he gets up in
18 the morning until he goes to bed (AR 456); the pain affects him
19 from his neck to his tail bone. (AR 460). Plaintiff testified
20 that he took no prescription medication because he is a recovering
21 alcoholic, does not like the feeling of being drugged, and he
22 cannot really afford it. (AR 456-457). He does odd jobs for
23 neighbors and has cut and sold firewood. (AR 458). He is a
24 member of the Eagles, goes to listen to live bands, and sometimes
25 dances. (AR 461). Plaintiff described his sleep as "most of the
26 time I think I do pretty fair." (AR 462-463). He does not have
27 problems with nightmares or flashbacks. (AR 462).

28 At the second administrative hearing held on November 9,

1 2005, plaintiff testified that he experiences pain from his neck
2 down into his legs daily. (AR 407). With respect to his
3 childhood back injury, plaintiff elaborated that when he was 18,
4 he had x-rays taken and was told he had three broken vertebrae; in
5 his late teens he went to a chiropractor and this eventually
6 relieved his pain. (AR 407-408). Plaintiff testified that he
7 continued with successful chiropractic treatments for about ten
8 years but he experienced daily pain for about the last 20 years.
9 (AR 408). At night plaintiff has trouble closing his right hand
10 and making a fist, and walking is painful. (AR 408).

11 SEQUENTIAL EVALUATION PROCESS

12 The Social Security Act (the "Act") defines "disability" as
13 the "inability to engage in any substantial gainful activity by
14 reason of any medically determinable physical or mental impairment
15 which can be expected to result in death or which has lasted or
16 can be expected to last for a continuous period of not less than
17 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
18 Act also provides that a Plaintiff shall be determined to be under
19 a disability only if his impairments are of such severity that
20 Plaintiff is not only unable to do his previous work but cannot,
21 considering Plaintiff's age, education and work experiences,
22 engage in any other substantial gainful work which exists in the
23 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
24 Thus, the definition of disability consists of both medical and
25 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
26 (9th Cir. 2001).

27 The Commissioner has established a five-step sequential
28 evaluation process for determining whether a person is disabled.

1 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he is
2 engaged in substantial gainful activities. If he is, benefits are
3 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If he
4 is not, the decision maker proceeds to step two, which determines
5 whether Plaintiff has a medically severe impairment or combination
6 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
7 416.920(a)(4)(ii).

8 If plaintiff does not have a severe impairment or combination
9 of impairments, the disability claim is denied. If the impairment
10 is severe, the evaluation proceeds to the third step, which
11 compares plaintiff's impairment with a number of listed
12 impairments acknowledged by the Commissioner to be so severe as to
13 preclude substantial gainful activity. 20 C.F.R. §§
14 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
15 App. 1. If the impairment meets or equals one of the listed
16 impairments, plaintiff is conclusively presumed to be disabled.
17 If the impairment is not one conclusively presumed to be
18 disabling, the evaluation proceeds to the fourth step, which
19 determines whether the impairment prevents plaintiff from
20 performing work he has performed in the past. If plaintiff is
21 able to perform his previous work, he is not disabled. 20 C.F.R.
22 §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step,
23 plaintiff's residual functional capacity ("RFC") assessment is
24 considered. If plaintiff cannot perform this work, the fifth and
25 final step in the process determines whether plaintiff is able to
26 perform other work in the national economy in view of his residual
27 functional capacity and his age, education and past work
28 experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v);

1 *Bowen v. Yuckert*, 482 U.S. 137 (1987).

2 The initial burden of proof rests upon plaintiff to establish
3 a *prima facie* case of entitlement to disability benefits.

4 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
5 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
6 met once plaintiff establishes that a physical or mental
7 impairment prevents him from engaging in his previous occupation.
8 The burden then shifts, at step five, to the Commissioner to show
9 that (1) plaintiff can perform other substantial gainful activity
10 and (2) a "significant number of jobs exist in the national
11 economy" which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d
12 1496, 1498 (9th Cir. 1984).

13 **STANDARD OF REVIEW**

14 Congress has provided a limited scope of judicial review of a
15 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
16 the Commissioner's decision, made through an ALJ, when the
17 determination is not based on legal error and is supported by
18 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995
19 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
20 1999). "The [Commissioner's] determination that a plaintiff is
21 not disabled will be upheld if the findings of fact are supported
22 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
23 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
24 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
25 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
26 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
27 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
28 573, 576 (9th Cir. 1988). Substantial evidence "means such

1 evidence as a reasonable mind might accept as adequate to support
2 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
3 (citations omitted). "[S]uch inferences and conclusions as the
4 [Commissioner] may reasonably draw from the evidence" will also be
5 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
6 On review, the Court considers the record as a whole, not just the
7 evidence supporting the decision of the Commissioner. *Weetman v.*
8 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
9 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

10 It is the role of the trier of fact, not this Court, to
11 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
12 evidence supports more than one rational interpretation, the Court
13 may not substitute its judgment for that of the Commissioner.
14 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
15 (9th Cir. 1984). Nevertheless, a decision supported by
16 substantial evidence will still be set aside if the proper legal
17 standards were not applied in weighing the evidence and making the
18 decision. *Browner v. Secretary of Health and Human Services*, 839
19 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
20 evidence to support the administrative findings, or if there is
21 conflicting evidence that will support a finding of either
22 disability or nondisability, the finding of the Commissioner is
23 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
24 1987).

25 ALJ'S FINDINGS

26 At the outset the ALJ found that plaintiff meets all of the
27 threshold requirements for Disability Insurance Benefits. (AR 17,
28 19).

1 The ALJ found at step one that plaintiff has not engaged in
2 substantial gainful activity since the alleged onset date, March
3 1, 2003. (AR 19). At step two, the ALJ determined that Plaintiff
4 suffers from the severe impairments of spondylosis, vision loss,
5 and hearing loss. (AR 19-20). The ALJ found that plaintiff does
6 not have a severe mental impairment. (AR 20). At step three the
7 ALJ found that Plaintiff does not have an impairment or
8 combination of impairments listed in or medically equal to one of
9 the listed impairments. (AR 22).

10 The ALJ concluded that plaintiff has the RFC to perform a
11 wide range of light work. (AR 22). At step four of the
12 sequential evaluation process, the ALJ found that plaintiff is
13 unable to perform his past relevant work. (AR 24-25). At step
14 five the ALJ relied on the vocational expert's testimony and
15 determined that because there are unskilled jobs plaintiff can
16 perform that exist in significant numbers both regionally and
17 nationally, plaintiff was not disabled within the meaning of the
18 Social Security Act. (AR 25-26). Because he found plaintiff was
19 not disabled, the ALJ was not required to perform Drug and Alcohol
20 Abuse ("DAA") analysis.

21 ISSUES

22 Plaintiff contends that the ALJ erred as a matter of law.
23 Specifically, he argues that:

24 1. The ALJ erred when he found that plaintiff does not suffer
25 from a severe mental impairment.

26 2. The ALJ erred by finding plaintiff less than completely
27 credible; and

28 3. The ALJ erred by failing to include chronic pain in the

1 hypothetical question that he asked the vocational expert.

2 (Ct. Rec. 13 at 7).

3 This court must uphold the ALJ's determination that plaintiff
4 is not disabled if the ALJ applied the proper legal standards and
5 there is substantial evidence in the record as a whole to support
6 the decision.

7 DISCUSSION

8 **A. Non-Severe Mental Impairment**

9 Plaintiff contends that the ALJ erred at step two by finding
10 that he did not suffer from a severe mental impairment, and cites
11 *Webb v. Barnhart*² in support. (Ct. Rec. 13, pp. 7-12). The
12 Commissioner responds that the ALJ properly weighed the medical
13 evidence provided by Thomas McKnight, Ph.D., and Ronald Klein,
14 Ph.D., and gave specific and legitimate reasons for rejecting the
15 contradicted opinion of treating psychologist Donna Rosen, Ph.D.
16 (Ct. Rec. 18, pp. 5-8).

17 An impairment or combination of impairments may be found "not
18 severe *only if* the evidence establishes a slight abnormality that
19 has no more than a minimal effect on an individual's ability to
20 work." *Webb. Barnhart*, 433 F. 3d 683, 686-687 (9th Cir.

21 2005)(citing *Smolen v. Chater*, 80 F. 3d 1273, 1290 (9th Cir.
22 1996); see *Yuckert v. Bowen*, 841 F. 2d 303, 306 (9th Cir. 1988).

23 If an adjudicator is unable to determine clearly the effect of an
24 impairment or combination of impairments on the individual's
25 ability to do basic work activities, the sequential evaluation
26 should not end with the not severe evaluation step. S.S.R. No.
27 85-28 (1985). Step two, then, is "a de minimus screening device

28 ²433 F. 3d 683, 686-687 (9th Cir. 2005).

1 [used] to dispose of groundless claims," *Smolen*, 80 F. 3d at 1290,
2 and an ALJ may find that a claimant lacks a medically severe
3 impairment or combination of impairments only when his conclusion
4 is "clearly established by medical evidence." S.S.R. 85-28. The
5 question on review is whether the ALJ had substantial evidence to
6 find that the medical evidence clearly established that the
7 claimant did not have a medically severe impairment or combination
8 of impairments. *Webb*, 433 F. 3d at 687; see also *Yuckert*, 841 F.
9 2d at 306.

10 In social security proceedings, the claimant must prove the
11 existence of a physical or mental impairment by providing medical
12 evidence consisting of signs, symptoms, and laboratory findings;
13 the claimant's own statement of symptoms alone will not suffice.
14 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated
15 on the basis of a medically determinable impairment which can be
16 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once
17 medical evidence of an underlying impairment has been shown,
18 medical findings are not required to support the alleged severity
19 of symptoms. *Bunnell v. Sullivan*, 947 F. 2d 341, 345 (9th Cir.
20 1991).

21 A treating or examining physician's opinion is given more
22 weight than that of a non-examining physician. *Benecke v.*
23 *Barnhart*, 379 F. 3d 587, 592 (9th Cir. 2004). If the treating or
24 examining physician's opinions are not contradicted, they can be
25 rejected only with clear and convincing reasons. *Lester v. Chater*,
26 81 F. 3d 821, 830 (9th Cir. 1996). If contradicted, the ALJ may
27 reject an opinion if he states specific, legitimate reasons that
28 are supported by substantial evidence. See *Flaten v. Secretary of*

1 *Health and Human Serv.*, 44 F. 3d 1453, 1463 (9th Cir. 1995).

2 Plaintiff was criminally charged for events which took place
3 on March 15, 2002, and as a result the court referred him for
4 anger management counseling.³ (AR 131, 175). Plaintiff began
5 seeing Donna Rosen, Ph.D., on July 11, 2002, about eight months
6 prior to onset. (AR 129-137). Dr. Rosen assessed a GAF of 60⁴.
7 (AR 130). On November 21, 2002, Dr. Rosen wrote a letter to
8 William Doyle, M.D., advising "my opinion is that he should apply
9 for disability" and that plaintiff's eye trouble should "be
10 adequate to justify not driving a logging truck." (AR 175). Dr.
11 Rosen opined that plaintiff had moderate to severe clinical
12 depression, significant suicidal ideation, and increasing anxiety;
13 she observed, "Whether there is a feasible alternative profession
14 for him is problematic." (AR 175). On December 3, 2002, Dr. Rosen
15 noted that Dr. Doyle prescribed paxil. (AR 177). She assessed a
16 GAF of 60. (AR 177).

17 On November 26, 2002, Dr. Doyle noted that plaintiff was
18 evaluated by Dr. Rosen. (AR 234). He assessed a retinal vein
19 branch occlusion, decreased hearing, and noted plaintiff has been
20 having a problem with depression. (AR 234). Dr. Doyle noted
21 plaintiff had not been on any antidepressant, recommended paxil,
22 and gave him samples. (AR 234). On February 5, 2003, a month
23

24 ³

25 Plaintiff was charged with domestic violence fourth degree assault
26 which was later reduced to disorderly conduct. He described grabbing,
27 slapping and hitting his girlfriend. (Tr. 131, 134).

28 ⁴

A Global Assessment of Functioning Scale (GAF) of 60 indicates
moderate symptoms (e.g., flat affect and circumstantial speech,
occasional panic attacks) or moderate difficulty in social,
occupational or school functioning (e.g., few friends, conflicts with
peers or co-workers). DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL
DISORDERS, 4th Ed., (DSM-IV), at 32.

1 before onset, Dr. Doyle noted that plaintiff "has been doing
2 fairly well." (AR 235). Plaintiff told Dr. Doyle that he feels
3 that he does better on the antidepressants. (AR 235). Dr. Doyle
4 noted "right back pain with significant severe spondylolysis and
5 degenerative disease, decreased left eye vision, and a marked
6 decrease in hearing. (AR 235).

7 The ALJ points out that in a June 22, 2005, letter, Dr. Rosen
8 reported that Plaintiff needed medication but could not afford to
9 buy it and was too depressed to complete the paperwork to apply
10 for medication through reduced fee programs. (AR 20, relying on
11 AR 354-355). In July of 2005, Dr. Rosen administered the MMPI-2.
12 (AR 356-368). The ALJ notes that the Restricted Clinical Scales
13 indicated that plaintiff was discouraged, cynical, preoccupied
14 with bodily concerns, likely to experience physical health
15 problems as a result of psychological or interpersonal
16 difficulties, at increased risk for depression and likely to be
17 aggressive and argumentative. (AR 20, 356-358). The ALJ notes
18 Dr. Rosen's opinion that plaintiff was "extremely dysfunctional"
19 and that his psychological prognosis was poor. (AR 20, citing
20 Exhibit F at AR 356).

21 The ALJ observes that at the hearing on August 11, 2005, Dr.
22 Rosen diagnosed plaintiff with a depressive disorder, a pain
23 disorder, and post-traumatic stress disorder. (AR 20, referring
24 to AR 443). The ALJ notes:

25 She [Dr. Rosen] indicated that the claimant was
26 withdrawn. She testified that the claimant could not 'deal
27 with the world at large' and that he exhibited anti-social
28 behavior. Dr. Rosen also testified that the claimant's mood
was depressed and that he had suicidal ideation and
interrupted sleep. She reported that the claimant had
experienced severe abuse as a child. She indicated that the
claimant's activities of daily living had been compromised by

1 anger and suspicion and that he had had a progressive
2 deterioration in his condition since 2003.

3 (AR 20-21, referring to AR 442-446, 449).

4 Thomas McKnight, Ph.D., examined plaintiff on June 12, 2003,
5 three months after the alleged onset date. (AR 199-203).
6 Plaintiff described blindness in his left eye, a hearing problem,
7 and described his back as "all messed up." (AR 199). Plaintiff's
8 hearing aid was uncomfortable, decreased his hearing, and caused
9 breathing difficulties. (AR 199). He took a daily aspirin and
10 nutritional supplements but no prescription medication. (AR 199).
11 No medical records were attached for Dr. McKnight's review. (AR
12 199). Plaintiff was seeing a counselor every two weeks for help
13 in dealing with "feelings getting through this disability"; his
14 counselor [Dr. Rosen] never assigned homework or reading material.
15 (AR 199). Plaintiff told Dr. McKnight that many years ago (when
16 his marriage was ending), he had some suicidal ideation, but
17 currently had no plan to harm himself. (AR 199). Dr. McKnight
18 noted that plaintiff had been sober for 27 years, last worked
19 driving a logging truck in February of 2003, and was on probation
20 for disorderly conduct after slapping his girlfriend. (AR 200-
21 201). Plaintiff gets up at 6:30 a.m., waters his yard and drives
22 to town for coffee and breakfast. (AR 201). He lives alone,
23 shops, cooks, does laundry, washes dishes and cleans. (AR 2001).
24 Plaintiff listens to his son play in a rock band, attends
25 community events, and on weekends goes to karaoke bars to listen
26 to music and dance a little. (AR 201). Dr. McKnight noted that
27 plaintiff goes to bed at eleven, has no trouble falling asleep and
28 sleeps through the night. (AR 201). Dr. McKnight's testing
showed plaintiff was fully oriented; he scored 27/30 on the Mini-

1 Mental Status Exam; memory was generally intact, and plaintiff's
2 mental status exam was within normal limits. (AR 201-202). Dr.
3 McKnight observed that plaintiff demonstrated functional hearing
4 and his vision did not cause problems during their contact. (AR
5 202). Dr. McKnight opined:

6 "There are no cognitive or psychological factors that
7 preclude Mr. Swim from continuing any work he has enjoyed in the
8 past. Any difficulty he may have is apparently secondary to
9 physical problems. He is cognitively capable of retraining and
10 working in different jobs involving at least three steps,
11 repetitive tasks."

12 (AR 203).

13 Dr. McKnight diagnosed adjustment disorder with mild
14 depression and assessed a GAF of 70 (excluding medical problems)⁵.
15 (AR 203).

16 The ALJ rejected Dr. Rosen's opinion as to the nature and
17 severity of plaintiff's mental disorders in part because it was
18 inconsistent with the opinion of examining physician Dr. McKnight.
19 (AR 21). The ALJ points out that Dr. McKnight opined that
20 plaintiff has no cognitive or psychological factors precluding any
21 of his past employment. (AR 21, referring to AR 203). The ALJ
22 observes that Dr. Rosen attempted to refute Dr. McKnight's opinion
23 as outdated (written more than 2 years before the hearing) because
24 plaintiff's condition progressively worsened since the onset date.
25 (AR 21, referring to AR 448-449).

26
27 5

28 A GAF of 70 indicates some mild symptoms (e.g., depressed mood and
mild insomnia) or some difficulty in social, occupational or school
functioning (e.g., occasional truancy, or theft within the household)
but generally functioning pretty well, has some meaningful
interpersonal relationships. (DSM-IV), at 32.

1 The ALJ observes that Dr. Rosen's progress notes do not
 2 reflect a worsening condition. (AR 21). The progress notes
 3 reflect only that the plaintiff had symptoms of suicidal ideation
 4 and sleep disturbance, and that his mental status was normal
 5 except for some disorganization. (AR 21, citing Exhibits 2F, 7F,
 6 and 11F). The ALJ opines that Dr. Rosen's progress notes do not
 7 suggest a progressive worsening of the plaintiff's symptoms after
 8 the alleged onset date, based on several factors: (1) Dr. Rosen's
 9 notes do not indicate a need for antidepressant medication, and
 10 she prescribed none; (2) The progress notes indicate that, since
 11 the onset date, Plaintiff has been able to maintain relationships
 12 with several women; and (3) Dr. Rosen's notes make little mention
 13 of alleged memory problems. (AR 21). Perhaps most significantly,
 14 the ALJ points out Dr. Rosen's testimony that plaintiff's GAF has
 15 been 45-50⁶ since the onset date of March 1, 2003. (AR 21, 449-
 16 450). This is not reflected in her progress notes where Dr. Rosen
 17 repeatedly assessed a GAF of 60 (or higher)⁷. (AR 21, citing
 18 Exhibits 2F, 7F and 11F). The ALJ is correct that Dr. Rosen's
 19 letters and testimony indicate the presence of profound
 20 depression, PTSD, and a pain disorder; her progress notes do not.
 21 (AR 21).

22 ⁶

23 A Global Assessment of Functioning Scale (GAF) of 45 to 50 indicates
 24 serious symptoms (e.g., suicidal ideation, severe obsessional
 25 rituals, frequent shoplifting) or any serious impairment in social,
 occupational or school functioning (e.g., no friends, unable to keep
 a job). (DSM-IV), at 32.

26 ⁷

27 As noted, a GAF of 60 indicates moderate symptoms or moderate
 difficulty functioning, whereas 61 to 70 indicates generally mild
 symptoms and functioning pretty well. Dr. Rosen assessed GAFs of 61,
 28 63, 62, and 60 from July of 2002 through December 2002. She assessed
 a GAF of 61 two months before onset, on January 7, 2003. (AR 130,
 138, 143, 149, 153, 156, 161, 168, 171, 177, 181, 185, 192, 237).

1 The ALJ also relied on the November 9, 2005, testimony of
2 medical expert Ronald Klein, Ph.D., when he weighed Dr. Rosen's
3 opinion. (AR 21). Dr. Klein pointed out that plaintiff's activity
4 level and his ability to maintain friendships did not support Dr.
5 Rosen's assessment. (AR 21, relying on AR 388-390, 403). Dr.
6 Klein diagnosed an adjustment disorder with some mild depression.
7 (AR 390).

8 The ALJ observed Dr. McKnight's opinion that there is no
9 evidence supporting Dr. Rosen's diagnoses of PTSD or a pain
10 disorder. (AR 22). The ALJ considered plaintiff's ability to
11 maintain social contacts, to go to karaoke bars, to listen to his
12 son's band, to work on cars, to cut firewood, and to take care of
13 all of his personal needs, when he assessed Dr. Rosen's opinion as
14 to the severity of plaintiff's impairment. The ALJ pointed out
15 that plaintiff never complained of severe depression to any
16 treating or examining physician. (AR 23). The ALJ's reasons for
17 rejecting the contradicted opinion of plaintiff's treating
18 psychologist are specific, legitimate, and supported by
19 substantial evidence. The ALJ did not err by finding at step two
20 that plaintiff does not suffer from a severe mental impairment.

21 **B. Credibility Determination**

22 Plaintiff contends that the ALJ erred by finding him less
23 than fully credible. (Ct. Rec. 13, p. 13-15). The Commissioner
24 responds that the ALJ appropriately relied on objective findings
25 and on plaintiff's daily activities when he assessed credibility.
26 (Ct. Rec. 18, p. 9-10). It is the province of the ALJ to make
27 credibility determinations. *Andrews v. Shalala*, 53 F.3d 1035,
28 1039 (9th Cir. 1995). However, the ALJ's findings must be

1 supported by specific cogent reasons. *Rashad v. Sullivan*, 903
2 F.2d 1229, 1231 (9th Cir. 1990). Once the claimant produces
3 medical evidence of an underlying impairment, the ALJ may not
4 discredit testimony as to the severity of an impairment because it
5 is unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d
6 715, 722 (9th Cir. 1998) (citation omitted). Absent affirmative
7 evidence of malingering, the ALJ's reasons for rejecting the
8 claimant's testimony must be "clear and convincing." *Lester v.*
9 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are
10 insufficient: rather the ALJ must identify what testimony is not
11 credible and what evidence undermines the claimant's complaints."
12 *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th
13 Cir. 1993).

14 The ALJ found that plaintiff did not report the existence of
15 severe, debilitating back pain to any treating or examining
16 physician. (AR 23). Less than six months before the alleged
17 onset date, plaintiff reported a history of multiple back injuries
18 but denied any current pain or restrictions. (AR 23, citing
19 Exhibit 6F/2 at AR 236). The ALJ points out that it was not until
20 the hearing that plaintiff described severe impairment. (AR 23).

21 The ALJ noted that plaintiff's treatment history is
22 inconsistent with disability and gave specific references to the
23 evidence in the record in that regard. (AR 23). The ALJ also
24 noted that plaintiff's allegations of debilitating musculoskeletal
25 pain are inconsistent with the results of physical examinations
26 and diagnostic studies: nearly two years after onset, in February
27 of 2005, plaintiff's spondylosis was mild. (AR 23, citing
28 Exhibits 11F/10 and 17F). Hip x-rays at that time showed some

1 enthesophyte formation along the greater trochanter and iliac
2 crest, but there was no evidence of fracture, dislocation or
3 significant degenerative changes. (AR 23, citing Exhibit 11F/11).

4 It was also noted by the ALJ that plaintiff's complaints of
5 disabling vision and hearing loss and an inability to use hearing
6 aids are inconsistent with the results of physical examinations
7 and observations by medical professionals. (AR 23). The evidence
8 relied on by the ALJ included the examination by osteopath Fred
9 Price, D.O., four months after the alleged onset date. (AR 222-
10 229). Dr. Price observed that plaintiff drove a standard
11 transmission vehicle about 90 miles to the exam, and complained of
12 hearing and vision problems as well as chronic back pain. (AR
13 222). Dr. Price reviewed medical records dated 7/11/02 (DOT exam
14 noting hearing loss, but otherwise considered healthy); 10/14 and
15 10/18/02 (left eye injury); 2/5/03 (notes, mostly by Dr. Doyle);
16 and 4/30/03 (request for disability and ROM exam). Plaintiff told
17 Dr. Price that he experienced back problems beginning when he fell
18 out of a tree as a teen, saw a chiropractor on several occasions,
19 and eventually returned to normal functioning. (AR 223). The
20 pain was worse from 1980 to 1995 although plaintiff's only
21 treatment was occasionally taking tylenol 3 given to him by his
22 brother or friends. (AR 223). Plaintiff told Dr. Price that he
23 had no insurance or ability to buy prescriptions, and was not
24 receiving back therapy or vision treatment. (AR 223-224). Dr.
25 Price observed that plaintiff appeared to have no difficulty
26 hearing even when Dr. Price's back was turned and he (Dr. Price)
27 was six feet away. (AR 224). Plaintiff lived with his dog in a
28 cabin heated by wood; he likes to fish, swim, and work on

1 vehicles. (AR 224). He took no medication but described a
2 history of some depression, treated intermittently with paxil. (AR
3 224-225). Dr. Price observed that plaintiff had no problems
4 getting on and off of the exam table (AR 225) and generally
5 appeared fit and strong. (AR 227).

6 Dr. Price noted no obvious difficulty with atrophy, spasm, or
7 acute discomfort on examination; upper and lower body strength
8 were good, and grip strength was 5/5. (AR 227-228). Dr. Price
9 assessed loss of visual acuity in the left eye and a history of
10 auditory acuity deficit, indicated that he did not have these
11 records to review, and noted that plaintiff had no difficulty
12 understanding him during the exam using conversational tones. (AR
13 228). Dr. Price observed that plaintiff was intermittently
14 thought to be depressed but was not currently being treated for
15 depression. (AR 228). He opined that plaintiff's back pain was
16 caused by degenerative changes in the lumbar and thoracic spine
17 consistent with age and labor history, and assessed plaintiff as
18 able to work at the medium level with only slight limitations.
19 (AR 228-229).

20 The ALJ found that plaintiff's credibility was undermined
21 because his activities of daily living are inconsistent with
22 disabling physical or mental impairments. (AR 23-24). Plaintiff's
23 activities include shopping, cooking, doing laundry, washing
24 dishes and housecleaning, as well as dancing, cutting firewood,
25 fishing, repairing cars, listening to his son's band, and
26 maintaining social contacts. (AR 24). The ALJ contrasted this
27 with Plaintiff's testimony that he experienced pain from his neck
28 to his feet daily, and did not feel like making an effort to go on
living because of his pain. (AR 22-23). The record supports the

1 ALJ's finding that plaintiff's activities are inconsistent with
2 the level of claimed impairment.

3 The ALJ relied on plaintiff's treatment history, the results
4 of physical examinations, diagnostic studies and observations of
5 medical professionals, as well as daily activities when he
6 assessed plaintiff's credibility. All are specific and legitimate
7 reasons supported by substantial evidence.

8 **C. Hypothetical to VE - Chronic Pain**

9 Plaintiff contends that the ALJ failed to include his chronic
10 pain in the hypothetical presented to the vocational expert. (Ct.
11 Rec. 13, pp. 14-15). The Commissioner responds that the ALJ
12 properly discredited plaintiff's complaints of chronic pain as
13 part of his credibility determination. (Ct. Rec. 18, pp. 9-10).

14 The ALJ found that plaintiff suffers from hearing and vision
15 problems and chronic back pain, but found plaintiff's claims as to
16 the severity of his pain were not supported by the evidence,
17 including plaintiff's less than complete credibility. As
18 indicated, the ALJ's credibility determination was fully
19 supported by the record. The ALJ properly included only the
20 impairments established by the evidence in his hypothetical. This
21 was proper.

22 The undersigned finds that the evidence of record supports
23 the ALJ's decision.

24 **CONCLUSION**

25 Having reviewed the record and the ALJ's conclusions, this
26 Court finds that the ALJ's decision that plaintiff is capable of
27 performing a wide range of work at the light level of exertion is
28 supported by substantial evidence and free of legal error.
Plaintiff is thus not disabled within the meaning of the Social

1 Security Act. Accordingly,

2 **IT IS ORDERED:**

3 1. Plaintiff's Motion for Summary Judgment (Ct. Rec.
4 12) is **DENIED**.

5 2. Defendant's Motion for Summary Judgment (Ct. Rec.
6 17) is **GRANTED**.

7 3. The District Court Executive is directed to enter
8 judgment in favor of Defendant, file this Order, provide a copy to
9 counsel for Plaintiff and Defendant, and **CLOSE** this file.

10 **DATED** this 12th day of April, 2007.

11 s/Michael W. Leavitt

12 MICHAEL W. LEAVITT
13 UNITED STATES MAGISTRATE JUDGE
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